**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/03819/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 22 January 2019** | **On 27 March 2019** |

**Before**

**MRS JUSTICE FARBEY**
**SITTING AS A JUDGE OF THE UPPER TRIBUNAL**
**UPPER TRIBUNAL JUDGE KING TD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**YC**

Respondent

**Representation:**
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms G Capel of Counsel, instructed by Duncan Lewis & Co

**DECISION AND REASONS**

**Introduction**

1. The Secretary of State appeals (with the permission of Upper Tribunal Judge H. H. Storey) against the decision of the First-tier Tribunal ("FTT") allowing the respondent's appeal on human rights grounds. The respondent is an Algerian national born in February 1983. She and her father entered the United Kingdom on 21 June 1994 on six-month visit visas which her father had procured. Neither the respondent nor her father

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departed from the United Kingdom at the expiry of their leave to enter. The respondent has never gone out of the United Kingdom since her arrival in 1994.

2. On 26 April 2016, the respondent made a ten-year family and private life application which was refused. On 7 November 2016, she was served with the relevant papers as an overstayer.

3. On 28 August 2017, at Cheshire Magistrates' Court, the respondent was convicted of eight charges of theft and sentenced to a total of 26 weeks imprisonment. This was not isolated offending: she has a lengthy criminal record for numerous other offences committed between September 2008 and May 2017. We will return to her criminal record in more detail below.

4. As a consequence of her offending, on 15 September 2017, the respondent was served with the Secretary of State's decision to deport her under section 5(1) of the Immigration Act 1971 on the ground that her deportation was deemed to be conducive to the public good. On 14 November 2017, she made representations against deportation, which included both an asylum and a human rights claim. In a decision sent by letter of 8 March 2018, the Secretary of State rejected the representations. The asylum and human rights claims were refused.

5. The respondent appealed to the FTT. By a determination promulgated on 19 July 2018, the FTT judge dismissed the appeal on asylum and humanitarian protection grounds but allowed the appeal under article 8 of the European Convention on Human Rights. The FTT judge concluded that the respondent's deportation would amount to a breach of the right to respect for private life.

6. Permission to appeal from the FTT was granted on the single ground that the judge had failed to conduct a lawful or reasonable assessment of whether the respondent had established exceptional or compelling circumstances outside the Immigration Rules so as to outweigh the public interest in her deportation.

**The FTT's determination**

7. We turn to the FTT's determination in more detail. The FTT reached its conclusions having seen and heard the respondent and her father give evidence. The respondent's evidence was found to be generally credible. Her father was found to be credible. In any event, there is no challenge to any of the FTT's findings of fact.

8. As regards asylum, the respondent claimed to have well-founded fear of persecution on the basis that she would face mistreatment as a Buddhist and that she would be the victim of gender-based harm and violence in Algeria. The FTT judge rejected that claim. The claim for humanitarian protection was likewise dismissed. We need say no more about asylum or protection issues, which are not the subject of this appeal.

9. As regards the respondent's private life, the FTT accepted that she had moved away from her father at around the age of 15 or 16 years old. She suffered a "fractured and disrupted childhood with little parental support and has lived in the UK for over 20 years being more than half her life". Her GP records in April 2001 (when she was aged 18) record her as having no permanent home and as having taken an overdose. She had tried to jump off a bridge and was in a persistent state of depression and anxiety.

10. In 2002, she was the victim of an attack which was so serious that she lost the sight of one eye. The FTT essentially found that she could not cope and became addicted to heroin which was in turn the catalyst for her offending which began in 2008. The FTT was presented with medical documentation that prior to her first offending, she had attempted suicide, taken overdoses and self-harmed.

11. The FTT took into consideration that the respondent accrued a number of convictions for theft (shoplifting) between 2008 and 2009, receiving a three-month prison sentence in May 2009. After her release, she managed to stop taking drugs, began employment and returned to college. She was convicted of criminal damage in 2011, receiving a conditional discharge. Her next offending took place in 2014. The FTT records that the respondent attributed that offending to problems arising from her lack of immigration status which was by that time apparent and meant that she was unable to continue her studies or to work. She began self-harming again and turned to drug abuse. This led to further convictions predominantly for shoplifting and other theft.

12. The FTT noted that, although she had a large number of convictions, they related to a more limited number of incidents. Her longest period of imprisonment was six months. All her offending had been dealt with in the Magistrates' Court. There was clear evidence that the pattern of offending was linked to drug use. She had demonstrated the ability to rehabilitate herself in the period between 2009 and 2014 (when it seems that her personal circumstances were more stable) save for the criminal damage offence which the FTT did not regard as serious. The respondent was motivated to remain drug-free.

13. The FTT accepted the respondent's evidence that she was unaware of any difficulties with her immigration status until 2014: she had no cause to know that she did not have lawful status in the United Kingdom and could not be blamed for unlawful stay as a child. The FTT took into consideration that, at the date of the appeal hearing, the respondent had lived in the UK for 24 years. Her only close family relationship was with her father who had indefinite to remain.

14. The FTT found that all of the respondent's social, cultural, familial and other ties were in the United Kingdom. She had no ties to Algeria. She would face serious obstacles to integration into Algerian society, given her mental state, the absence of any family support in relation to employment or accommodation, and the length of her absence from Algeria.

15. The FTT held that the respondent was completely westernised. She was not fluent in French; and her lifestyle and behaviour were likely to be at odds with Algerian norms. In addition, her mental health difficulties "would add to her vulnerability in what would be an alien society".

16. Against this background, the FTT judge concluded:

> "In considering the evidence in the round, I do find that the [respondent] had established that there are truly exceptional circumstances which would outweigh the public interest in deporting her. To rebalance the scales in favour of the [respondent] against deportation there must be very compelling reasons which must be exceptional. I find that in weighing up all the relevant factors that the [respondent] has established that very compelling reasons exist to outweigh the public interest".

## Legal framework

17. The FTT and the Upper Tribunal will respect the high level of importance which the legislature attaches to the deportation of criminals (*NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 W.L.R. 207, para 22). Under paragraph 396 of the Immigration Rules, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The presumption does not apply in "automatic" deportation cases, but we are not concerned with the provisions for automatic deportation in the present appeal.

18. Paragraph 398 of the Immigration Rules insofar as material applies to persistent offenders like the respondent and provides:

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> ...
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State…they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 ".

19. Paragraph 399 of the Rules applies if a person has a parental relationship with a child under the age of 18 years or relationship with a British or settled partner. The respondent does not fall within its provisions. Paragraph 399A concerns the social and cultural integration of a person in the UK but applies only if a person has been lawfully resident in the UK for most of his or her life, such that it does not apply to the respondent.

20. It follows that the question which fell to be determined by the FTT was whether the public interest in deportation was outweighed by very compelling circumstances over and above those described in paragraph 399 and 399A. That is undoubtedly a very high test.

21. The test in the Rules (and the corresponding test in section 117C of the Nationality, Immigration and Asylum Act 2002) is nevertheless intended to "provide a structured basis for application of and compliance with Article 8, rather than to disapply it" (*NA (Pakistan)*, above, para 26). The Secretary of State and any tribunal "must look at all the matters relied on collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation" (*NA (Pakistan)*, above, para 32). A claimant who cannot meet the test for social and cultural integration under paragraph 399A (because he or she does not have the requisite lawful residence) may meet the "very compelling circumstances" test in paragraph 398 on the basis of integration; but such cases must be especially strong and will therefore be rare (*NA (Pakistan)*, above, paras 29 and 33).

**Analysis and conclusions**

22. In our view, the FTT did not make a material error of law. There are a number of highly particular features which lead us to uphold the judge's determination. A combination of unusual factors enabled the "very compelling circumstances" test to be met in this case.

23. First, there can be no challenge to the FTT's finding that the respondent's social, cultural and family ties are entirely in the United Kingdom: she has no ties at all with Algeria. Arriving as an eleven-year old child, she has not left the UK on any occasion since then. It is strong mitigation for overstaying her visa that she was brought to the United Kingdom as a child by her father.

24. On behalf of the Secretary of State, Mr Melvin submitted that even if she was blameless as a child, the respondent failed to get in touch with the Home Office to regularise her status when she turned 18. However, the FTT accepted that the respondent had no knowledge of her irregular status until 2014, when she would have been 31 years old. The FTT found as a fact that she suffered serious mental health problems when she found out that she did not have immigration status. She had made an application to regularise her status by 2016. These unusual circumstances mitigate the overstay and so reduce the harm to effective immigration control which may usually be implied from remaining in the United Kingdom without leave.

25. Secondly, the respondent has been the victim of violent crime, losing vision in one eye. After that happened, she descended into self-harm to the extent that she tried to jump off a bridge. Uncertainty in relation to her immigration status triggered other acts of self-harm. In our view, these compassionate factors are relevant to the question whether the public

interest demands that the respondent should be removed from the entirety of her social and familial ties. The FTT Judge found that the respondent had been rehabilitated between 2009 and 2014 and that she was at the time of the hearing drug-free with the intention of remaining so. Mr Melvin failed to persuade us that the FTT was bound to conclude that the public interest in these very particular circumstances outweighed other factors.

26. Mr Melvin emphasised those factors which weigh in favour of deportation. He emphasised that the respondent is a repeat offender. We have considered her criminal record. Prior to the 2017 offences which triggered the deportation decision, the respondent had already been convicted of 29 other offences of theft. She pleaded guilty to battery on 15 January 2009 and to common assault on 21 January 2009. Those are her only violent offences and they plainly fall at the lower end of the scale. She pleaded guilty to criminal damage in 2011 and was (as we have set out above) sentenced to a conditional discharge. She has on a number of occasions been convicted of failing to surrender to custody at the appointed time. Many entries on her criminal record relate to resentencing for earlier offences after community sentences were not effective to prevent further offending. She has nevertheless for the most part received either non-custodial or suspended sentences.

27. We do not minimise the public interest in deporting offenders whose convictions may be comparatively low level but whose repeated offending may in principle require their deportation as being conducive to the public good. However, we have formed the view that the FTT's conclusions about the respondent's offending and its causes were rationally open to it. There is also no suggestion that the respondent has ever supplied drugs to anyone else, which would have elevated the seriousness of her offending considerably and shifted the balance.

28. In relation to other parts of the evidence, Mr Melvin pointed out that an OASys report before the FTT had assessed the respondent as posing a medium risk of serious harm to the public. Although the report noted that she was using skills provided through programmes and counselling, he submitted both orally and in writing that the FTT had given undue weight to the respondent's prospects of rehabilitation contrary to *Secretary of State for the Home Department v Olarewaju* [2018] EWCA Civ 557 at [17] and [26]. However, we do not accept that the FTT judge ignored the effect of the OASys report or afforded undue weight to the prospects of rehabilitation. Rather, the evidence about risk and rehabilitation was elucidated as part of the FTT's consideration of the evidence as a whole. Neither of these factors were in our view decisive one way or the other.

29. The FTT was entitled to consider all the evidence in the round. It was a matter for the FTT to accord weight to the various strands of the evidence as it saw fit. This Tribunal will only interfere if the FTT’s conclusions were unreasonable. In our view, the FTT reached conclusions that were open to it on the evidence before it.

30. Permission to appeal was granted on the basis that the FTT's assessment of the case outside the Immigration Rules was flawed. The FTT's analysis of the law is at times confusing; it seems to combine the test under paragraph 398 of the Rules with its consideration of the case outside the Rules. Nevertheless it is plain that the FTT appreciated the high threshold which the respondent needed to meet and that it applied the test of very compelling circumstances, which is the correct test under paragraph 398 and the corresponding provisions of the 2002 Act. Any lack of clarity in the exposition of the law does not in our view give rise to any error which could affect the outcome of the appeal.

31. Our conclusion turns on the unusual facts of this case. Nothing that we have said is to be regarded as laying down any sort of principle that a repeat low-level offender will be immune from deportation on human rights grounds.

32. On this basis, the appeal by the Secretary of State is dismissed.

**Notice of Decision**

The appeal before the Upper Tribunal is dismissed. The First tier decision allowing the respondent's appeal is to stand.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Date: 25 March 2019

THE HON MRS JUSTICE FARBEY sitting as an Upper Tribunal Judge.